IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.5033 OF 2005.

The Principal,
SNDT College of Arts & Smt. C.B.
College of Commerce & Economics for Women & Ors.... ..
Petitioners.
V/s
Shri Gautam Janu Munganekar & Ors... ... ..
Respondents.

Mr.Girish S. Godbole, Adv. For the petitioners.

Mr.Mihir Desai, Adv. For respondent No.1.

CORAM: A.P.DESHPANDE, J.

20.2.2007.

PC:

Rule.

Returnable forthwith.

Taken up for hearing by consent of parties.

1. This petition is filed by the Management of Junior College calling in question the legality and validity of the judgment and order dated 26.10.04 passed by the Presiding Officer, School Tribunal, Mumbai. Few facts that are necessary to adjudicate the issue involved in this petition are narrated herein below.

2. Respondent No.1 was appointed as Lecturer in junior college

initially in academic session 1995-96 and thereafter in academic session 1996-97. Respondent No.1 was appointed temporarily for the said two academic sessions for the reason that the first respondent was an untrained teacher during the said period and could not have been appointed on probation. However, respondent NO.1 obtained training and became eligible for being appointed as Lecturer/Assistant Teacher in the junior college from the commencement of academic session 1997-98. By an order of appointment dated 20.6.1997 respondent No.1 came to be appointed as lecturer/assistant teacher in the junior college on probation for a period two years. Record reveals that before the appointment of respondent No.1 the petitioner had not sought permission/approval of the Education Officer to fill in the post as is required by section 5 of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977 (hereinafter referred to as "the Act"). The proviso to sub-section 1 of section 5 of the Act obliges the Management, before proceeding to fill in the vacancy, to ascertain from the Education Officer/Deputy Director of Education as to whether there is any suitable person available on the list of surplus persons maintained by him (under Rule 26 of the MEPS Rules) for absorption in the other school and in the event of such person being available the Management shall appoint that person in such vacancy. After appointment of respondent No.1 in the post of

lecturer/assistant teacher the petitioner forwarded the proposal for seeking approval to the appointment of respondent No.1. The Deputy Director of Education refused to approve appointment of respondent No.1 in view of non-obtaining of prior approval for filling up the vacancy and on the ground that the appointment of respondent No.1 was surplus being over and above the sanctioned strength of the staff. Acting on the communication from Deputy Director dated 16.10.1997 the petitioner proceeded to terminate the services of respondent NO.1 by order dated 18.11.97 with effect from 17.12.97. Aggrieved by termination so effected during the probation period the respondent No.1 preferred appeal before the School Tribunal. During the pendency of the appeal before the Tribunal respondent No.1 came to be appointed in some other college from November, 1999 onwards and it is undisputed that he continues to be in the employment of that institution since November, 1999 till date. In view of having obtained the appointment elsewhere respondent No.1 herein gave up the relief with regard to reinstatement in service and restricted the appeal for claiming back wages. The Tribunal having held that the termination is illegal, quashed and set aside the same. The Tribunal granted continuity of service with effect from 18.11.97 i.e. the date of termination and has also awarded full back wages for the period from the date of termination till respondent No.1 got appointment in other

institution i.e. November, 1999. It is this order passed by the Tribunal which is challenged by filing the present writ petition. The learned counsel appearing for the petitioner has raised two submissions (i) that the appointment order stipulated one of the conditions to the effect that the appointment of the respondent No.1 is subject to the approval of the Deputy Director of Education, Mumbai. The contention is that as the Deputy Director of Education has declined to approve the appointment, the termination of respondent No.1 is justified as termination is as per terms of the contract of appointment and (ii) that as respondent No.1 gave up his claim for reinstatement the appeal itself is not maintainable under section 9 of the Act. Lastly it is contended that order passed by the Tribunal deserves to be modified and the entire monetary burden ought not be saddled on the petitioner in view of fact that the respondent No.1 has hardly worked with the petitioner for a period of five months and termination was much before the completion of probation period of two years.

3. Dealing with the first submission that one of the terms in the appointment order did provide that the appointment of respondent No.1 was subject to approval by Deputy Director of Education it has to be observed that the said condition cannot be included as one of the terms in the appointment order for the reason that Rule 9(5) provides that candidate appointed to the post has to be issued an order of

appointment in accordance with the format prescribed in Schedule `D'. Schedule `D' does not include any condition providing for prior or post facto approval as condition for continued employment. There are two Full Bench judgments holding the field. The first one is in the case of ***Premlata Sudhakar Sathe*** v. ***Governing Body of G.S.Tompe College & Ors.*** BCI (1981) 27 whereas the other one is in the case of ***St.Ulai High School & Anr.*** v. ***Devendraprasad Jagannath Singh & Anr.*** 2007 (1) Mh.L.J. 597. Both the judgments go to hold that as the format of appointment is statutory in nature and intended to provide safeguard to the employees the term of appointment cannot be varied to the disadvantage of the employees and hence it is held that such term cannot be inserted in the statutory format of the appointment order. Hence suffice it to say that the first contention sought to be canvassed by the learned counsel for the petitioner stands rejected in view of the law laid down by the Full Bench in the above referred judgments.

4. Bare perusal of section 9 would reveal that the appeal is maintainable against an order of dismissal, removal or termination. Just because the appellant gives up relief, the Tribunal is not divested of the jurisdiction to entertain the appeal. Hence the contention canvassed by learned counsel for the petitioner that as the respondent No.1 has given up relief of reinstatement the appeal itself is rendered

infructuous on account of the Tribunal loosing the jurisdiction to adjudicate the same is ill founded. The Tribunal continues to have the jurisdiction to decide the appeal wherein an order of dismissal/termination is impugned, whether the appellant claims relief of reinstatement or otherwise. Hence second contention also needs to be rejected. Coming to the last submission it is relevant to note that the respondent No.1 has hardly put in five months of service as trained teacher with the petitioner and the termination has been effected solely on account of refusal of approval that too within probation period. This being the position I do not find any justification for the Tribunal to award full back wages from the date of termination till the respondent No.1 seeking appointment elsewhere viz. in November, 1999. In my opinion, the Tribunal in the factual situation of the present matter ought to have had recourse to section 11(2) (e) of the Act which lays down that where the Tribunal decides not to reinstate the employee or in any other appropriate case, it would be open for the Tribunal to award compensation by directing payment of salary for a period of 12 months if the employee has put in more than 10 years of service and to compensate employee by paying six months' salary (pay & allowance) where the employee has put in less than 10 years of service by way of compensation having regard to loss of his employment. I am of the view that the ends of justice would be met

by modifying order passed by the Tribunal by awarding six months' salary to respondent No.1 in lieu of claim of his reinstatement as is permissible u/s.11(2)(e) of the Act.

5. At this stage learned counsel for respondent No.1 has pointed out that the continuity of service has been granted by the Tribunal with effect from 18.11.1997 and it is submitted that the same ought to be with effect from 20.6.97 it being the date of appointment of respondent No.1 as a trained teacher on probation. The learned counsel for the petitioner does not oppose the said modification as the same is just and proper. In the result, the writ petition is partly allowed. Impugned order passed by the Tribunal to the extent it grants full back wages for the period commencing from 18.11.97 till November, 1999 is quashed and set aside and instead petitioner is directed to compensate respondent No.1 by paying salary for the period of six months. The amount of six months' salary payable by the petitioner to respondent No.1 shall be paid within a period of eight weeks from today. The direction No.3 in the operative part of order of the Tribunal shall stand modified to the extent it grants continuity of service from 18.11.97 by substituting said date as 20.6.97 viz. The date of appointment of respondent No.1. Rule made absolute partly in above terms with no order as to costs.